Filed 2/9/04 P. v. Ongolea CA1/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. LONI A. ONGOLEA, Defendant and Appellant.	A099497 (San Mateo County Super. Ct. No. SC031248A)

In 1993, Mr. Ongolea pleaded no contest to one count of violating Penal Code[1] section 12021, subdivision (a). He long ago successfully completed probation and, in 2001, had the conviction expunged pursuant to Penal Code section 1203.4. Nevertheless, he still faces the possibility of deportation as a result of his 1993 conviction. He contends that this court should reverse the 1993 conviction because the trial court erred in denying his motion to suppress the gun that was found in a patdown search. We cannot reach the merits, however, because the notice of appeal was not timely filed.

In 2001, pursuant to this court's order to show cause, the trial court granted a petition for habeas corpus alleging ineffective assistance of counsel, and issued an order directing the clerk of the superior court to file a late notice of appeal. We shall conclude that because Mr. Ongolea was not in actual or constructive custody when he filed the

[1] All subsequent statutory references are to the Penal Code unless otherwise indicated.

2001 petition, the trial court lacked jurisdiction to grant habeas relief. In the absence of a valid factual or legal basis for relief from the jurisdictional time limits for filing a notice of appeal, the notice of appeal is not timely filed and this appeal must be dismissed.

FACTS

In 1993, after a trial court denied Mr. Ongolea's motion to suppress a gun found in a patdown search, he pleaded no contest to one count of violating section 12021, subdivision (a). The court suspended imposition of sentence, and granted three years probation, on condition that he serve six months in county jail. On June 19, 2001, Mr. Ongolea obtained relief pursuant to section 1203.04, and the record of his conviction was expunged.

In November 2001, Mr. Ongolea, who still risked deportation as a result of the 1993 conviction, filed a petition for writ of habeas corpus in this court (*In re Ongolea*, Nov. 28, 2001, A096919) seeking permission to file a late notice of appeal.[2] He alleged that neither the trial court nor his trial counsel had advised him that, despite his guilty plea, he had a right to seek appellate review of the order denying his motion to suppress. He further alleged that he remained ignorant of his right to appeal, and of the availability of relief from failure to file a timely notice of appeal, until he consulted "post-conviction counsel on June 27, 2001." He claimed he could not reasonably have known earlier than June 2001, when he consulted "post-conviction counsel," that he had such rights. The petition specifically alleged: "No prior action has been filed regarding the loss of Mr. Ongolea's appellate rights in this court, or any court, except for the Motion to File Late Notice of the Appeal. . . ."

Based on the 2001 petition, this court issued an order to show cause, returnable before the superior court, why Mr. Ongolea should not be entitled to file a late notice of appeal from the judgment of conviction entered upon his plea of nolo contendere in 1993. The People did not file a return in the superior court and, at the hearing, informed the

[2] This court had previously denied his Motion to File Late Notice of Appeal "without prejudice to any rights he may have to challenge his conviction by writ of habeas corpus." (*People v. Ongolea* (Nov. 13, 2001, A096563.)

court they agreed with Mr. Ongolea's counsel that the relief sought should be granted. The judge, who had been prepared to assign the matter out for a hearing, responded that if there were "a stipulation" he would simply sign the order granting the writ, and issued an order directing the clerk to file the late notice of appeal. The People did not exercise their right to appeal from that order.

I

THE TRIAL COURT WAS WITHOUT JURISDICTION TO GRANT RELIEF FROM FAILURE TO FILE A TIMELY NOTICE OF APPEAL

It is well-established that a jurisdictional prerequisite for habeas corpus relief is that the petitioner allege a factual basis for finding that he or she is in actual or physical custody. (*Mendez v. Superior Court* (2001) 87 Cal.App.4th 791, 796 [habeas corpus remedy unavailable to challenge a seven-year-old conviction, allegedly based upon false testimony from an officer later involved in the "Ramparts scandal," because petitioner was not in prison, on probation or parole, or otherwise in actual or constructive custody]; *In re Azurin* (2001) 87 Cal.App.4th 20, 25 [actual or constructive custody is a "habeas corpus jurisdictional requirement under California law"]; *In re Wessley W.* (1981) 125 Cal.App.3d 240, 246-247 [court reversed order granting habeas relief with respect to expunged conviction because petitioner was not in actual or constructive custody, despite allegations that expungement did not relieve him of all penalties and burdens of conviction]; see also *Maleng v. Cook* (1989) 490 U.S. 488, 491-492 [affirming an order dismissing a petition for habeas corpus for lack of subject matter jurisdiction because, at the time the petition was filed, the petitioner had served his prison sentence, was not on parole, and concept of constructive custody should not be extended so far as to include the possible use of a prior conviction for sentence enhancement].)

Mr. Ongolea did not allege that he was in actual or constructive custody. The factual allegations of his November 2001 petition, and the July 2001 order granting

1203.04 relief, established that he was not.[3] The November 2001 petition alleged that he was sentenced in 1993 to six months in jail and three years probation with credit for 88 days served. The grant of the 1203.04 petition was based upon his successful completion of probation, and the fact that he had since led a law-abiding life and was not, at the time of the petition, on probation or serving a sentence for any other offense. He alleged no other basis for finding actual or constructive custody. Instead, in his points and authorities he simply asserted that he sought to challenge the 1993 conviction at "this late date in order to prevent the Immigration and Naturalization Service from permanently banishing him from the United States." He did not even allege that he was actually being detained by the INS. But, even if he had, in *In re Azurin* (2001) 87 Cal.App.4th 20, 23-24, 26, the court held there is no jurisdiction to grant habeas relief to a permanent legal resident subject to deportation proceedings, even if detained by the INS, based upon a criminal conviction for which the petitioner has served his prison term and been released from parole. The court held the petitioner was not in actual custody and the risk of deportation, for habeas purposes, does not constitute constructive custody. In any event, the court reasoned that even if the petitioner were actually detained by the INS, the INS is a different sovereign than the State of California and the court therefore still would have lacked jurisdiction to grant habeas relief. (*Id.* at p. 26.)

Because Mr. Ongolea did not allege he was in custody, this court had no jurisdiction to issue its order to show cause and the trial court was, therefore, without jurisdiction to grant him relief from the failure to timely file a notice of appeal from his 1993 conviction.

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[3] This deficiency was not brought to this court's attention before we issued our order to show cause. Nevertheless, the issuance of an order to show cause does not finally determine the legal sufficiency of the claim for relief. (*In re Hochberg* (1970) 2 Cal.3d 870, 875, fn. 4.)

II

JURISDICTION CANNOT BE CONFERED BY THE ACTIONS OF THE PARTIES

After the case was fully briefed on the merits, this court reviewed the entire superior court file, which included a prior petition for habeas corpus filed in 1994.[4] In that petition, Mr. Ongolea, with the assistance of counsel and while he was still on probation, alleged he had received ineffective assistance of counsel with respect to the 1993 conviction because he was not advised of the immigration consequences of his plea. That petition specifically alleged that "[n]o appeal has been taken as petitioner does not challenge the legality of his plea proceedings." In its order denying the 1994 writ petition, the superior court found, among other things, that Mr. Ongolea knew, from prior deportation proceedings initiated in *1990* based on earlier convictions for violation of sections 594, subdivision (b)(4) and 487.2, and Vehicle Code section 23152, that if he pleaded guilty to a felony he could face deportation as a result of the conviction. It further found that his defense counsel in the 1993 case attempted, but failed, to negotiate a plea to a misdemeanor and could not reasonably have negotiated a plea to a lesser offense not including gun possession. The court also found that both the plea form and the court warned Mr. Ongolea that he could be deported based upon his plea. So advised, he nevertheless pleaded guilty.

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[4] Section 1475 provides, in pertinent part: "Every application for a writ of habeas corpus . . . shall state whether any prior application or applications have been made for a writ in regard to the same detention or restraint complained of in the application, and if any such prior application . . . [has] been made the later application must contain a brief statement of all proceedings had therein, or in any of them, to and including the final order or orders made therein, or in any of them, on appeal or otherwise." The verified allegations of the 2001 petition did not include a statement that a prior petition for habeas corpus had been filed in 1994, nor did it include a copy of the final order denying that petition. The 2001 petition merely alleged, "No prior action has been filed regarding *the loss of Mr. Ongolea's appellate rights* in this court, or any court, except for the Motion to File a Late Notice of the Appeal. . . ." The only reference to a prior petition is buried in footnote 6 at page 23 of his points and authorities. That footnote, however, does not mention the date of the prior petition, or provide any other information identifying it, its subject matter, or outcome, and does not disclose that Mr. Ongolea was represented in

It is a well-established principal that the time limits for filing a notice of appeal are jurisdictional, and cannot be extended. (See, e.g., *In re Chavez* (2003) 30 Cal.4th 643, 650 [a timely notice of appeal under Rule 31(d) is " 'essential to appellate jurisdiction' " and an untimely notice is " 'wholly ineffectual: the delay cannot be waived, it cannot be cured by nunc pro tunc order, and the appellate court has no power to give relief, but must dismiss the appeal' "]; *People v. Mendez* (1999) 19 Cal.4th 1084 [same];[5] *Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc*. (1997) 15 Cal.4th 51, 56; *In re Anderson* (1971) 6 Cal.3d 288, 293-294 ["the time limit provided by [former] rule 31(a) 'may not be extended' (rule 45(c), Cal. Rules of Court), and is jurisdictional"].)

Mr. Ongolea's 2001 habeas petition was based upon a narrow exception to the rule that the court, in criminal appeals, is without power to extend the time limits for filing a notice of appeal. (See, e.g., *In re Benoit* (1973) 10 Cal.3d 72, 86-89.) Relief from the failure to file a timely notice of appeal may be available based upon an incarcerated defendant's reasonable reliance upon an attorney or prison official to perfect an appeal, or mail a notice of appeal. (*Ibid*.) Our Supreme Court has also held that ignorance of the right of appeal, or of time limits to appeal, may also be a ground for relief, especially where the court is required, but fails, to advise the defendant of his appellate rights under

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the 1994 proceedings by postconviction counsel. The People also failed to bring the 1994 petition to this court's attention in their opposition.

[5] Recently our Supreme Court has strictly construed rule 31, especially as applied to appeals of convictions following a guilty plea. In *In re Chavez, supra,* 30 Cal. 4th 643 the court held that the courts of appeal have no power pursuant to California Rules of Court, rule 45(e) to relieve a defendant from the failure to file a statement of reasonable grounds, pursuant to section 1237.5, or from the failure to file a timely notice of appeal, and that the facts did not support the limited relief available under the doctrine of constructive filing. In *People v. Mendez, supra,* 19 Cal.4th 1084, the court held that the provisions of section 1237.5 and rule 31(d) should be strictly construed (*Mendez,* at p. 1098), and expressly disapproved of the practice of liberal construction, or finding substantial compliance, and proceeding to dispose of the appeal on the merits simply because the issues are already before the court. (*Ibid*.)

the rules of court or, through ineffective assistance of counsel, the defendant was not properly advised of, or consulted regarding, grounds for appeal. (*People v. Acosta* (1969) 71 Cal.2d 683, 689-690; *Castro v. Superior Court* (1974) 40 Cal.App.3d 614, 619-621.)

Nevertheless, in order to obtain relief the defendant must demonstrate diligence, and offer an explanation and excuse for the delay between sentencing and filing, after any disability is removed. (*In re Anderson* (1971) 6 Cal.3d 288, 293-294.) Even in the case of a claim of ignorance of the right to appeal, a defendant must explain this period of delay and a defendant, such as Mr. Ongolea, who has suffered prior convictions bears a "heavy burden" of establishing actual ignorance and diligence. (*People v. Acosta, supra*, 71 Cal.2d at pp. 689-690 ["it is pertinent to observe that any significant delay between sentencing and the filing of a petition for relief from a late filing under rule 31(a) must be reasonably explained or the doctrines of waiver and estoppel will be invoked to deny relief"]; *Castro v. Superior Court* (1974) 40 Cal.App.3d 614,621, fn. 9 [same].) When based upon a claim of ineffective assistance of counsel, relief from the failure to file a timely notice of appeal may be obtained by writ of habeas corpus. (See *id.* at pp. 619-621.)[6]

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[6] This body of law was originally developed pursuant to former California Rules of Court, rule 31(a), which authorized the courts of appeal to grant relief from failure to timely file a notice of appeal to ameliorate the harshness of former rule 31, which allowed only 10 days in which to file. Nevertheless, in *In re Benoit, supra*, 10 Cal.3d at pp. 81-84, the court held that the power to grant relief by petition for habeas corpus, based upon the doctrine of constructive filing, continued to exist even after the amendments to rule 31, effective in 1972, which deleted subdivision (a), increased the time to 60 days, and added an amendment to the rules of court requiring the court to advise defendants of their appeal rights "upon conviction after trial" (see also *Castro v. Superior Court, supra,* 40 Cal.App.3d at p. 619). It is unclear what effect the more recent decisions, such as *In re Chavez*, *supra*, 30 Cal.App.4th 643 and *Mendez, supra*, 19 Cal.4th 1084, strictly construing rule 31 have on the continued viability of cases extending relief beyond the narrow recognition of constructive filing. In the absence of explicit rejection by our Supreme Court of these earlier decisions, we shall assume that, on the proper facts, and subject to the petitioner's burden to show that the right to appeal could not have reasonably been discovered earlier, and a showing of diligence, such relief continues to be available.

The People, in their informal opposition, requested that, if this court did not summarily deny the petition, it issue an order to show cause returnable to the superior court to determine whether Mr. Ongolea was actually ignorant of the right to appeal, and remained so for the approximately seven years since his conviction.

Generously construing the allegations of the petition, and the declarations in support of it, that (1) Mr. Ongolea's trial counsel did not advise him of the right to seek review of the order denying his motion to suppress despite his guilty plea, or consult with him concerning whether there were meritorious issues to raise on appeal; and (2) that he remained ignorant of the right to appeal until June 27, 2001, when he finally consulted with postconviction counsel, we issued an order to show cause returnable in the superior court. (See *Roe v. Flores-Ortega* (2000) 528 U.S. 470 [a claim of ineffective assistance of counsel with respect to advice and consultation regarding right to appeal, that is promptly raised by incarcerated petitioner, may be a basis for habeas relief in the form of permission to file late appeal]; see also *Castro v. Superior Court, supra,* 40 Cal.App.3d at p. 621, fn. 9 [actual ignorance of right to appeal may justify defendant's failure to take any action to confirm that notice has been filed, or to file it within jurisdictional time period, but petitioner must establish actual ignorance, not mere failure to advise of right, and specifically allege when first learned or right, and show diligence as soon as relieved of ignorance or disability].) The People elected not to file a return and informed the trial court that they agreed to the requested relief. The court stated that it would sign the order based upon the "*stipulation*" of the parties.

It is well-established that the parties to litigation cannot confer appellate jurisdiction upon this court by stipulation or consent, and that the absence of appellate jurisdiction is not a waivable defect. (*Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 666-667; *Four Point Entertainment, Inc. v. New World Entertainment, Ltd.* (1997) 60 Cal.App.4th 79, 81, fn. 1.) This court has a sua sponte duty to determine whether a notice of appeal is timely filed, and that we have appellate jurisdiction. (*Ibid*.) Although limited relief may be granted from these jurisdictional time limits by petition for habeas corpus based upon a claim of ineffective assistance of counsel, an order

granting such relief predicated solely upon a stipulation of the parties violates the proscription against attempts to confer appellate jurisdiction by consent.

Mr. Ongolea, relying on *In re Crow* (1971) 4 Cal.3d 613, 622, contends that this court must, nevertheless, accept the notice of appeal as timely filed, based upon the finality of the order granting the habeas petition, and proceed to a disposition of his appeal on the merits.[7] He asserts that, as result of the failure of the People to appeal, all factual and legal issues with respect to the order granting habeas relief are now res judicata. By failing to appeal the order granting habeas relief the *People* are, of course, barred by principles of res judicata from challenging it; however, the doctrine of res judicata establishes the finality of judgments only as between *parties* to the litigation. It does not bar *this court* from ascertaining whether, independent of the stipulation, a factual and legal basis exists for relief from the jurisdictional time limits for filing a notice of appeal. "The parties to a judicial proceeding cannot, either jointly or severally, effectively stipulate or concede that the court either has or lacks jurisdiction to act in the particular matter." (*Griggs v. Superior Court* (1976) 16 Cal.3d 341, 344, fn. 2.) The parties, having *stipulated* to the relief sought, have no interest in, and will not raise by appeal, or other means, any objection to appellate jurisdiction. The People, by agreeing to the order, waived their right to appeal and Mr. Ongolea, of course, has no reason to challenge it. Indeed, in any case where the parties attempt to confer appellate jurisdiction on this court by consent or stipulation, the *parties* will not seek review, or object to appellate jurisdiction, because they have *agreed* that this court should exercise its jurisdiction and resolve the appeal on the merits. In light of the absence of any incentive for the parties to challenge the grant of a habeas petition and order granting relief from the normal time limits for filing a notice of appeal, the only way the jurisdiction of this court can be protected from an improper attempt by the parties to confer appellate jurisdiction by consent is for this court to raise the issue of its jurisdiction sua sponte.

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[7] We note that the relief granted by the Sacramento Superior Court in *In re Crow* fell clearly within that court's jurisdiction. (*In re Crow, supra,* 4 Cal.3d at p. 619.)

We conclude that, in these unique procedural circumstances, where the habeas relief sought consists of relief from the jurisdictional time limits for filing a notice of appeal, this court is not barred by the failure of the People to appeal from raising, sua sponte, the question whether a factual and legal basis for our appellate jurisdiction has been properly established.

Mr. Ongolea next contends that our order to show cause with respect to the 2001 petition is "law of the case" and establishes, independent of the parties' stipulation below, his *legal* entitlement to habeas relief. He asserts that once the People failed to file a return, the truth of his factual allegations was established. (See *In re Serrano, supra,* 10 Cal.4th at p. 455.) He further suggests that the sufficiency of those facts to state a *legal* claim for habeas relief is established by our order to show cause. He then concludes that there was nothing left for the trial court to do, once the People elected not to file a return, but to grant the petition. To the contrary, the issuance by this court of an order to show cause is only a *preliminary* determination that the petitioner has made a prima facie case, and creates a "cause" giving the People a right to reply. "[W]hen an appellate court issues an order to show cause . . . returnable before a lower court . . . the appellate court's preliminary determination that the petitioner has stated grounds which if proved would entitle him to habeas corpus relief is *not equivalent to a final appellate court decision of questions of law in favor of petitioner under the doctrine of law of the case*." (*In re Hochberg, supra,* 2 Cal.3d at p. 875, fn. 4.) Thus, even when the People do not file a return, the trial court is not compelled to grant relief and may determine the facts alleged are legally insufficient to state a claim for relief. Moreover, our order to show cause does not preclude a challenge to that legal ruling in this court. (*Ibid*.) In *In re Serrano, supra,* 10 Cal.4th 447, the court also expressly rejected the assertion that, when the People do not file a return, the court is precluded from making *factual* findings *adverse* to the petitioner. (*Id*. at p. 455.) Instead, the correct procedure when the People fail to file a return is that the court must "accept as true the petitioner's undisputed factual allegations, *in the absence of a reference hearing*, and to decide the merits of the case accordingly." (*Ibid*., italics added.) However, even in the absence of an evidentiary

hearing, in some cases, such as a habeas petition seeking reinstatement of a dismissed appeal based upon ineffective assistance of counsel, "the record . . .will contain facts refuting the [undisputed] allegations made in the petition. Under such circumstances, the court is justified in making a credibility determination adverse to the petitioner. . . *without first ordering an evidentiary hearing*." (*Id.* at p. 456, italics added.)

Mr. Ongolea, therefore, was not automatically entitled to the relief sought, simply because this court issued an order to show cause and the People did not file a return. The trial court, instead, should have reviewed its own file to determine whether the facts alleged were uncontroverted or whether there were factual disputes necessitating a further evidentiary hearing. If it determined that the facts alleged were not controverted and must be deemed true, it should also have determined whether they were sufficient to state a legal claim for habeas relief.[8]

The file in the 1994 petition for habeas corpus in the superior court included a document which, if it had been considered by the court, might well have led it to conclude that the truth of the essential factual allegations of the petition were controverted, or at least sufficiently in dispute that a further evidentiary hearing was required. The 2001 petition alleged that due to the failure of his trial counsel properly to advise Mr. Ongolea, he was actually ignorant of his right to appeal the 1993 conviction, and he did not discover, and reasonably could not have discovered, that he had such a right until he met with postconviction counsel in June of 2001. Although the 2001 petition did not affirmatively misstate the facts, the omission of any mention of the 1994 petition in the verified allegations created the clear implication that Mr. Ongolea had not filed any prior petitions collaterally attacking the 1993 conviction, or consulted with any

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[8] We, of course, do not hold that the court may never grant habeas relief based upon the People's consent. Obviously, such a holding would place an unreasonable burden upon the resources of the already overburdened courts. We hold only that where, as here, the specific relief sought is an exception to the jurisdictional time limits for filing a notice of appeal, to preclude attempts to confer appellate jurisdiction by stipulation or consent, the court must determine whether a factual and legal basis exists for granting such an exception, independent of the parties' agreement.

postconviction counsel before June of 2001.[9] Yet, on the face of the 1994 petition, and from the order denying it, it is clear that Mr. Ongolea had consulted with postconviction counsel approximately *seven years earlier* and knew, at least that long ago, that unless he set aside the 1993 conviction he could face deportation. Yet, he did not allege he did anything more to investigate what legal methods might be available to challenge his conviction, and took no further legal action until he filed the 2001 petition. (See, e.g., *People v. Trantow* (1986) 178 Cal.App.3d 842, 847 [a legal resident alien, convicted in 1970, and who had, in 1973, obtained section 1203.04 relief, and in 1976 filed an unsuccessful petition for habeas corpus based upon the "risk of deportation," failed to show reasonable diligence in filing a petition for *coram nobis* in 1984, because, even if she was unaware of the legal procedure of *coram nobis*, she clearly knew as early as 1976 of the importance of finding some legal means of setting aside the conviction to avoid the immigration consequences].) The 1994 petition also raises serious questions regarding the credibility of Mr. Ongolea's assertion that he was actually ignorant of his appeal rights until 2001, because it specifically alleged that "[n]o appeal has been taken as petitioner does not challenge the legality of the plea proceedings."

We, however, need not decide whether the allegations of the 1994 petition, and the order denying it, controverted the essential factual allegations of the 2001 petition, or, as Mr. Ongolea argues, necessitate a further evidentiary hearing because, even if all the factual allegations of the petition are deemed true, the petition's failure to allege that

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[9] Instead of falsely alleging that no prior petitions had been filed, the 2001 petition alleged that "[n]o prior action has been filed *regarding the loss of Mr. Ongolea's appellate rights* in this court, or any court, except for the Motion to File Late Notice of Appeal . . . ." This allegation was not false, because the 1994 petition challenged only counsel's advice regarding immigration consequences of the plea, not the failure to advise of the right to appeal, and to consult regarding grounds for appeal. Nevertheless, the 2001 petition did fail to disclose the fact of the 1994 petition, and the final order denying it, thereby creating the false impression that appellant had not had the assistance of any postconviction counsel and had filed no prior petitions regarding the 1993 conviction.

Mr. Ongolea was in *actual or constructive custody* deprives the courts of jurisdiction to entertain the petition on its merits.

Mr. Ongolea *concedes* the absence of actual or constructive custody, but urges that we should nevertheless fashion some other form of "equitable relief" to permit a very late direct appeal of his 1993 conviction. He relies upon *Roe v. Flores-Ortega, supra*, 528 U.S. 470, for his assertion that, even if habeas relief is unavailable, this court should fashion some other form of "equitable" relief to permit a late notice of appeal. The decision in *Roe v. Flores-Ortega* simply established "the proper framework [in a federal habeas corpus petition] for evaluating an ineffective assistance of counsel claim, based on counsel's failure to file a notice of appeal without respondent's consent," *when the issue is properly raised as a habeas claim, in a timely fashion*. (*Id*. at p. 473.) In *Roe v. Flores-Ortega,* trial counsel allegedly promised to file an appeal, and within four months of sentencing, as soon as the defendant was released into the general prison population after being in lock-up, the defendant discovered that no notice of appeal had been filed, and tried to file his own, which was rejected as untimely. (*Id.* at p. 474.) He then promptly sought habeas relief based upon ineffective assistance of counsel, and then filed a federal habeas petition. (*Ibid*.) Nothing in that decision stands for the proposition that, if habeas relief is unavailable, either because of delay in seeking relief or because of some other defect, such as the absence of actual or constructive custody, that some other form of "equitable relief" must be judicially created.

CONCLUSION

We conclude that the trial court was without jurisdiction to grant habeas relief in the form of an order directing the clerk to accept for filing the late notice of appeal, and the notice of appeal is not timely filed under rule 31(d). We therefore dismiss the appeal for lack of appellate jurisdiction.

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STEIN, Acting P.J.

We concur:

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SWAGER, J.

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MARGULIES, J.